



June 19, 2020

VIA FOIAONLINE.REGULATIONS.GOV

U.S. Environmental Protection Agency

Re: Freedom of Information Act Request: NMFS Biological Opinion Implementation Training Materials from EPA

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

#### REQUESTED RECORDS

The Center requests from the U.S. Environmental Protection Agency (“EPA”), Office of Pesticide Programs:

The records demonstrating EPA’s efforts to develop training materials to inform the public and pesticide applicators about relevant endangered species and critical habitats associated with the findings of the 2017 National Marine Fisheries Service (“NMFS”) biological opinion on chlorpyrifos, diazinon and malathion. These records are mentioned in a July 19, 2019 letter to NMFS, and referenced in the attached letter from NMFS to EPA. Attachment A (NMFS June 23, 2019 Letter to EPA).

For this request, the term “records” refers to documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." *Id.* § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." *Id.* § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

Finally, agencies must preserve all the records requested herein while this FOIA is pending or under appeal. The agency shall not destroy any records while they are the subject of a pending request, appeal, or lawsuit under the FOIA. 40 C.F.R. § 2.106; *see Chambers v. U.S. Dept. of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act"). If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. A court held an agency in contempt for "contumacious conduct" and ordered the agency to pay plaintiff's costs and fees for destroying "potentially responsive material contained on hard drives and email backup tapes." *Landmark Legal Found. v. EPA*, 272 F. Supp.2d 59, 62 (D.D.C. 2003); *see also*

*Judicial Watch, Inc. v. Dept. of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys' fees and costs because, among other factors, agency's "initial search was unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed"), *aff'd in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys' fees and costs, the court found that an Assistant United States Attorney prematurely "destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending" and referred him to the Department of Justice's Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

### FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). "Readily accessible" means text-searchable and OCR-formatted. *See id.* Pursuant to this requirement, we hereby request that you produce all records in an electronic format and in their native file formats. Additionally, please provide the records in a load-ready format with a CSV file index or Excel spreadsheet. If you produce files in .PDF format, then please omit any "portfolios" or "embedded files." Portfolios and embedded files within files are not readily accessible. **Please do not provide the records in a single, or "batched," .PDF file.** We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. *Id.* § 552(b). Please correlate any redactions with specific exemptions under FOIA.

### RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. *Id.* § 552(a)(6)(A)(i); 21 C.F.R. § 20.41(b). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. We prefer email, but you may mail copies of records to:

Ann K. Brown  
Center for Biological Diversity  
P.O. Box 11374  
Portland, OR 97211  
foia@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please email me to discuss the scope of this request.

### REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *NARA v. Favish*, 541 U.S. 157, 171 (2004) quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ... ." 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

#### I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). EPA's regulations at 40 C.F.R. § 2.107(l)(1)-(3) establish the same standard.

Thus, EPA must consider six factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably broad audience of persons interested in the subject, (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. *Id.* § 2.107(1)(2), (5) whether a commercial interest exists and its magnitude, and (6) the primary interest in disclosure. As shown below, the Center meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of the EPA. This request asks for the records demonstrating EPA’s efforts to develop training materials to inform the public and pesticide applicators about relevant endangered species and critical habitats associated with the findings of the 2017 NMFS biological opinion on chlorpyrifos, diazinon and malathion. These records are mentioned in a July 19, 2019 letter to NMFS, and referenced in the attached letter from NMFS to EPA. Attachment A.

This FOIA will provide the Center and the public with crucial insight into the training materials purportedly created by EPA. It is clear that a federal agency’s development of materials is a specific and identifiable activity of the government, and in this case it is the executive branch agency of EPA. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Center to convey to the public information about EPA’s training materials. Given that EPA has stated that it has created training materials, the public has a right to see them or at least gain an understanding about where EPA is in creating them. Once the information is made available, the Center will analyze it and present it to its over 1.7 million members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of EPA’s operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of EPA’s Biological Opinion Training Materials.

The requested records will contribute to public understanding of whether EPA’s actions are consistent with its mission “to protect human health and the environment.”<sup>1</sup> As explained above, the records will contribute to public understanding of this topic.

Activities of EPA generally, and specifically training materials EPA created to inform the public and pesticide applicators about relevant endangered species and critical habitats associated with

---

<sup>1</sup> EPA, *Our Mission and What We Do*, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Jun. 19, 2020).

the findings of the NMFS biological opinion on chlorpyrifos, diazinon and malathion are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about this subject matter. *See W. Watersheds Proj. v. Brown*, 318 F. Supp.2d 1036, 1040 (D. Idaho 2004) (finding that “WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment”).

Through the Center’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F. Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F. Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which are not currently in the public domain. *See Cnty. Legal Servs.*, 405 F. Supp.2d at 560 (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... .”<sup>2</sup>

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of the substance of EPA’s training materials. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about this topic.

#### D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of the environmental impact of the training materials developed by EPA, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about this issue.

---

<sup>2</sup> In this connection, it is immaterial whether any portion of the Center’s request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

The records are also certain to shed light on EPA's compliance with its own mission.<sup>3</sup> Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

E. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than over 1.7 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

II. The Center's Primary Interest in Disclosure is the Public Interest.

As stated above, the Center has no commercial interest that would be furthered by disclosure. Although even if it did have an interest, the public interest would far outweigh any pecuniary interest.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 30 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in over 5,000 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on EPA's penchant for favoring industry over best available science utilizing information obtained by the Center from federal agencies. In 2019, more than 2.9 million people visited the Center's extensive website, and viewed pages a total of 5.3 million times. The Center sends out more than 297 email newsletters and action alerts per year to more than over 1.7 million members and supporters. Three times a year, the Center sends printed newsletters to more than 74,500 members. More than 561,000 people

---

<sup>3</sup> See *supra* note 1.

follow the Center on Facebook, and there are regular postings regarding environmental protection. The Center also regularly tweets to more than 85,000 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of the EPA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney*, 19 F.3d 807. The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

### III. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee waiver. We hope that EPA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,



Ann K. Brown  
Open Government Coordinator  
CENTER FOR BIOLOGICAL DIVERSITY  
P.O. Box 11374  
Portland, OR 97211-0374  
foia@biologicaldiversity.org

### Attachment

Attachment A (NMFS June 23, 2019 Letter to EPA)



## **Attachment A**



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
Silver Spring, MD 20910

**JUL 23 2019**

Mr. Richard P. Keigwen, Jr.  
Director, Office of Pesticides Program  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. (7501P)  
Washington, D.C. 20460

Dear Mr. Keigwen:

Thank you for your letter of July 19, 2019 requesting re-initiation of formal consultation on the National Marine Fisheries Service's (NMFS) Endangered Species Act (ESA) section 7 biological opinion of December 29, 2017, on EPA's registration of pesticides containing the organophosphate active ingredients chlorpyrifos, diazinon, and malathion (2017 biological opinion). Under 50 C.F.R. § 402.16, reinitiation of formal consultation is required whenever certain specific conditions are met. In addition, NMFS and action agencies retain discretion to seek reinitiation of formal consultation in other circumstances as appropriate. We agree to reinitiate consultation on these pesticide registrations, following a process outlined below. This reinitiated consultation will consider new information as described in your letter, in the following categories:

**(1) Stakeholder Input**

We recognize that at the time the 2017 biological opinion was completed, EPA and NMFS had wished to continue interagency discussions, and to consider additional stakeholder input. Your letter requests reinitiation in part for NMFS to consider stakeholder input on the biological opinion and Reasonable and Prudent Alternatives, based on the comments received by EPA during its public comment process convened last year. *See* 83 Fed. Reg. 12754 (Mar. 23, 2018).

**(2) New Data and Methods Information**

As EPA noted in its letter to NMFS on February 21, 2018, at the time the biological opinion was issued, EPA and NMFS wished to engage in further discussions of consultation methodology, and EPA was engaged in efforts to develop new information and methods such as employing use and usage information on all three pesticides that has not previously been considered. In your recent letter, you note the ongoing efforts to develop and refine approaches for incorporating use and usage data throughout the consultation process, and also make note of the direction in the Agriculture Improvement Act of 2018 for the FIFRA Interagency Group to work collaboratively on improving and refining consultation methodologies.



NMFS plans to carefully consider the information that will be provided to it, as described above. At the conclusion of this consultation, NMFS will, if appropriate, issue either a new or revised biological opinion supplanting or supplementing the existing opinion.

NMFS's schedule to complete this consultation must take into account resource constraints and other obligations to complete ESA consultations on EPA FIFRA registrations. As you know, NMFS presently is under mandatory, court-ordered deadlines to complete a biological opinion on bromoxynil and prometryn (by December 31, 2019); and a biological opinion on 1,3-D and racemic metolachlor (by December 31, 2020). See *NW. Center for Alternatives to Pesticides, et al. v. NMFS*, Stipulation and Order, Dkt. 50, No. 2:07-cv-01791-RSL (W.D. Wash. May 21, 2014). In addition, we also anticipate that this consultation may be informed by the work now ongoing to incorporate usage data into the ongoing EPA consultation with FWS on malathion, which we understand is currently scheduled to be completed by March 2021.

In light of these considerations, NMFS proposes the following schedule:

1. Compilation of public and stakeholder comments: By 30 days after date of NMFS letter, EPA will provide an organized compilation in writing to NMFS of all the substantive public and stakeholder comments received from its public comment process on the OPs BiOp, along with a summary identifying the substantive issues or new information provided in comments that EPA wishes for NMFS to address during this reinitiated consultation.
2. Additional EPA data and information: By December 31, 2019, EPA will provide any additional data and information in writing to NMFS it wishes to be considered in the reinitiated consultation process, including any use and usage data not already addressed in the 2017 EPA biological evaluations, as well as any other information relevant to how EPA believes use and usage data should be considered by NMFS.
3. NMFS response regarding biological opinion: By 120 days from the receipt of all the information from EPA specified under items 1 and 2 above, NMFS will inform EPA as to whether or not it will be appropriate, based on the information presented, for NMFS to issue a new or revised biological opinion. If NMFS has determined that it will not issue a new or revised biological opinion, it will by this date issue a final written determination explaining that determination, including its explanation of how NMFS considered the additional information by EPA (i.e., the information described above in items 1 and 2). Otherwise, NMFS will inform EPA at this time of its intent to issue a new or revised biological opinion by the date set forth below in step 5.
4. Applicant plan: If NMFS informs EPA of its intention to issue a new or revised biological opinion (see item 3), then within 30 days from that date, EPA will identify any applicants and work with NMFS to develop a specific plan for applicant involvement consistent with the Enhancing Stakeholder Input document.<sup>1</sup>

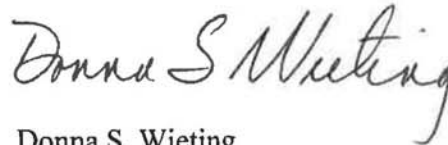
---

<sup>1</sup> See <https://www.regulations.gov/document?D=EPA-HQ-OPP-2012-0442-0038>

5. New or revised biological opinion: If NMFS preliminarily determines that a new or revised biological opinion will be issued (see Item 3), then NMFS will issue the new or revised biological opinion by June 2022.

You also inquired about implementation of the 2017 biological opinion's RPAs and RPMs during the period of this reinitiated consultation. We have always understood that the 2017 biological opinion and its RPAs were recommending that EPA go through a process to change some of its current practices, and that such a process would take some time to fully implement. To that end, we understand that EPA is either planning or is in the process of completing the following activities as reasonable steps toward implementation of the RPAs and RPMs in the 2017 Biological Opinion issued under the ESA. EPA states in its letter of July 19, 2019, that the Agency is developing training materials to inform the public and pesticide applicators about relevant endangered species and critical habitats associated with the findings in the biological opinion. These materials should also include information on possible risk reduction measures (e.g., best management practices) that the public and pesticide applicators could employ to reduce pesticide exposures and impacts to listed species. These materials could be provided through webinars and other means of providing information to the public and pesticide applicators. The initial steps regarding implementation of the biological opinion as outlined above (and as set out in EPA's letter) are appropriate steps toward addressing the Agency's obligations under ESA sections 7(a)(2) and 9. NMFS staff looks forward to engaging with EPA staff on EPA's plans for further steps, keeping in mind that the reinitiation of consultation may ultimately result in a superseding biological opinion.

EPA has also stated that they have gathered additional use and usage data on these three pesticides and provided this data to NMFS. EPA will provide any additional data as it becomes available. NMFS looks forward to continuing to work with you on these matters.



Donna S. Wieting  
Director  
Office of Protected Resources